IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7357 OF 2005

Smt.Nirmala Balaram Mhatre .. Petitioner

Vs.

Shri Damji Deaji Bhanushali .. Respondent

Mr.M.D.Parab for the petitioner

CORAM : S.U.KAMDAR, J
DATED : 24TH NOVEMBER, 2005

P.C.:

1. The present writ petition is filed challenging the order passed by the Civil Judge, Senior Division, Alibaug dt.9.9.05. Some of the material facts of the present case are as under:

2. A suit was filed by the respondent being suit no.74 of 1981 before the Civil Judge Senior Division, Alibaug. The suit was dismissed. Against the said order of dismissal the original plaintiff thereafter preferred an appeal being appeal no.39 of 1988 before the 1st appellate court. In both the matters, two persons were

parties one Laxmibai and the petitioner herein i.e.Nirmala Balaram Mhatre. Both were claiming the title by way of joint adverse possession and it was their case that both Laxmibai and Nirmala Mhatre were in joint possession of the suit property. During the pendency of the 1st appeal, on 6.10.92 the said defendant no.1 i.e.Laxmibai expired. However, the petitioner herein who was defendant no.2 in the suit pursued the matter and contested the litigation and after decree was passed in 1st appeal, on 19.10.93 the second appeal was filed before this court which has also been dismissed. The first Appellate Court has come to the conclusion that neither the plaintiff who was the defendant no.2 in that suit nor Laxmibai has become owner by adverse possession and that the plaintiff in that suit is entitled to possession of portion of land which was encroached upon. Accordingly, the first appellate court has passed a decree for possession. Now the application has been filed for the purpose of execution of the said decree passed by 1st appellate court on 19.10.93. After the litigation was finally concluded right upto the second appeal in the present case, the petitioner

herein filed her own suit being suit no.196 of 2001. In the said suit the petitioner moved an application for interim injunction for staying the darkhast (Execution Application) No. 21 of 1994. The said application was dismissed by the second Joint Civil Judge, Senior Division,Alibaug by order dt.9.9.05. Simultaneously, the present application is filed by the petitioner who was the defendant no.2 in the suit interalia contending that the decree passed was a nullity because it was passed without bringing legal heirs of Laxmibai on record who died during the pendency of the 1st appeal. On 9.9.05, the learned trial court after considering the various authorities has come to the conclusion that on the facts of the present case the said contention is not maintainable because the petitioner and Laxmibai were claiming joint possession in respect of the suit property and were claiming joint right. On expiry of Laxmibai the claim only remained was of the petitioner herein and was considered and decided by the 1st Appellate Court and this court.

3. In my opinion, the contention for decree as

nullity is totally devoid of any merits. It is because the claim is not based on any title on which the legal heirs are required to be brought on record of the said Laxmibai. In the present case, the claim was of joint possession of petitioner with Laxmibai. On expiry of Laxmibai, right was left with the petitioner and petitioner has contested the said suit on her own ground. However having failed, now the ground that Laxmibai has expired she cannot question the execution proceeding. In that view of the matter, there is no substance in the present petition, petition is dismissed accordingly. No order as to costs.